

No. 91-1393

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In the Supreme Court of the United States

OCTOBER TERM, 1992

A.L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, PETITIONER

v.

BOBBY RAY FRETWELL

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a writ of habeas corpus may issue to a prisoner based on a claim that his counsel was ineffective in failing to make an objection that might have been successful at the time but that a subsequent decision of this Court has shown to be meritless.

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INTEREST OF THE UNITED STATES

This case presents the question whether a federal court may grant a writ of habeas corpus when a defendant's lawyer fails to raise an issue that may have benefited his client at the time, but which has subsequently been shown (by virtue of a decision of this Court) to be without merit. Although this case involves a state prisoner seeking relief under 28 U.S.C. 2254, the principles established in this case would likely apply to collateral attacks mounted by federal prisoners under 28 U.S.C. 2255. The United States therefore has a significant interest in the Court's analysis and decision in this case.

STATEMENT

1. On December 14, 1984, respondent Bobby Ray Fretwell entered the home of Sherman Sullins, a resident of Marshall, Arkansas, stole his money at gunpoint, and shot him dead. Respondent and two companions then fled in Sullins' pick-up truck. Pet. App. A22. Respondent was tried for the crime in an Arkansas state court in August 1985. The jury convicted him of capital felony murder and sentenced him to death. *Id.* at A23.

During the penalty phase, the prosecutor argued that the evidence presented at the guilt phase showed the existence of two aggravating circumstances: that the murder was committed for pecuniary gain, and that the murder was committed to facilitate respondent's escape. Respondent's counsel argued that no aggravating circumstances had been proved and that respondent's difficult and disadvantaged childhood was a mitigating circumstance. Pet. App. A23. The jury found no mitigating circumstances and one aggravating circumstance—that respondent had committed the murder for pecuniary gain. The jury then sentenced respondent to death. *Id.* at A23-A24.

2. Respondent appealed his conviction and sentence to the Supreme Court of Arkansas. One question raised in that court was whether respondent's sentence should be reversed in light of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), cert. denied, 474 U.S. 1013 (1985). In *Collins*, the Eighth Circuit had held that a jury may not impose the death penalty on the basis of an aggravating circumstance that duplicates an element of the underlying felony. Under the *Collins* rule, it was improper for the jury to consider pecuniary gain as an aggravating circumstance, because pecuniary gain was an element of respondent's offense—murder in the course of a robbery. Because

respondent had not objected to the sentencing proceeding on that ground in the trial court, the Arkansas Supreme Court declined to decide whether it would adopt the Eighth Circuit's position in *Collins*. Rejecting the remainder of respondent's claims, the court affirmed his conviction and sentence. *Fretwell v. State*, 708 S.W.2d 630, 634 (Ark. 1986).

In his direct appeal, respondent did not raise any claim of ineffective assistance of counsel, see *Fretwell v. State*, 708 S.W.2d at 631-634. In a subsequent state habeas corpus proceeding, however, respondent argued that his counsel had rendered ineffective assistance by failing to raise a *Collins*-based objection at the penalty phase of his trial. See *Fretwell v. State*, 728 S.W.2d 180, 181-183 (Ark. 1987). The Arkansas Supreme Court rejected that claim because, at the time of respondent's trial, the Arkansas courts had not passed on the question decided in *Collins*. The state supreme court observed that "[a]n attorney is not ineffective for failing to raise every novel issue which might conceivably be raised." 728 S.W.2d at 181. The court denied respondent's petition for post-conviction relief.

3. On May 27, 1987, respondent filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the Eastern District of Arkansas. He claimed that his attorney had failed to provide effective assistance of counsel at the suppression hearing, the guilt phase, and the penalty phase of his trial, and that the trial court had erred in refusing to set aside the verdict as being contrary to the evidence. Pet. App. A24-A25. The district court rejected all of respondent's claims except the one based on counsel's failure to object to the submission of pecuniary gain as an aggravating circumstance.

In assessing that claim, the district court observed that the Eighth Circuit had decided *Collins* seven months before respondent's trial. The district court concluded that, "[a]s an attorney representing a defendant in a capital murder case, trial counsel had a duty to be aware of all law relevant to death penalty cases." Counsel's failure to bring *Collins* to the trial court's attention and interpose an objection to the jury's consideration of pecuniary gain as an aggravating circumstance was a "serious and significant error," the court concluded. Pet. App. A27. The district court noted that *Collins* was no longer good law in light of *Lowenfield v. Phelps*, 484 U.S. 231 (1988); in that case, this Court held that the Constitution permits a State to treat a factor as an aggravating circumstance even though that factor is also an element of the underlying offense. See Pet. App. A27 n.2.¹ The court nevertheless ruled that counsel's failure to object to the consideration of pecuniary gain prejudiced respondent.

Because *Collins* "was the law in the Eighth Circuit" at the time of respondent's trial, the district court expressed confidence "that the trial court would have followed the ruling in *Collins* had trial counsel made an appropriate motion." Pet. App. A28. The court noted that the jury had found pecuniary gain to be the only aggravating circumstance. Had the trial court declined to submit the issue of pecuniary gain to the jury, the district court reasoned, "the jury would have had no option but to sentence petitioner to life imprisonment without parole." The district court therefore vacated respondent's sentence

¹ The Eighth Circuit formally overruled *Collins* in *Perry v. Lockhart*, 871 F.2d 1384, cert. denied, 493 U.S. 959 (1989), which relied on this Court's decision in *Lowenfield*.

and ordered that, unless Arkansas undertook to hold another sentencing proceeding, his sentence would be reduced to life imprisonment without parole. *Ibid.*

4. The court of appeals affirmed in part and remanded with directions that respondent's sentence be reduced to life imprisonment without parole. Pet. App. A1-A14. In considering respondent's ineffective assistance claim, the court stated that relief was appropriate under this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), if "(1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced petitioner's defense." Pet. App. A5-A6. The court first rejected the State's contention that the trial court would have "overrule[d] a *Collins* objection" on the ground that *Collins* was inconsistent with this Court's decisions in *Jurek v. Texas*, 428 U.S. 262 (1976), and *Zant v. Stephens*, 462 U.S. 862 (1983). According to the court of appeals, those cases involved "significantly different" sentencing schemes from the one that was at issue in *Collins*. Pet. App. A6-A8.

The court of appeals then considered "whether a state trial court would have sustained a *Collins* objection to the instruction on pecuniary gain as an aggravating circumstance." Pet. App. A12. The court reasoned that because "the precedent that existed at the time of [respondent's] trial was not clearly inconsistent with *Collins* and since state courts are bound by the Supremacy Clause to obey federal constitutional law, we conclude that a reasonable state trial court would have sustained an objection based on *Collins* had Fretwell's attorney made one." *Id.* at A12-A13. Because there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at A13 (quoting *Strickland*, 466 U.S. at 694), the

court concluded that respondent had suffered prejudice of the kind required to make out a claim of ineffective assistance of counsel.

The court of appeals disagreed with the district court's order in one respect. The district court had offered the State the option of holding another sentencing proceeding if it wished to seek the death penalty. The court of appeals held that respondent should not be subject to a resentencing proceeding at which he might be sentenced to death. To conduct a resentencing proceeding under current law, the court of appeals stated, "would perpetuate the prejudice caused by the original sixth amendment violation." The court therefore directed the district court to modify its order "to reduce unconditionally [respondent's] sentence to life imprisonment without parole." Pet. App. A14.

Judge Loken dissented. Pet. App. A14-A20. He observed that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at A15 (quoting *Strickland*, 466 U.S. at 686). To establish prejudice under *Strickland*, Judge Loken concluded, respondent had to show not only that his sentence "probably would have been different had his counsel made a *Collins* objection," but also that the "ineffective assistance of counsel has deprived him of a fundamentally fair sentencing, or of a specific constitutional right designed to guarantee a fair sentencing." Pet. App. A15-A16, A17. Since the decision in *Lowenfield* "established that [respondent's] sentencing jury was given instructions that did not violate his Eighth Amendment rights" (Pet. App. A17), Judge Loken concluded that respondent's sentencing proceeding

was neither unreliable nor unfair, and that counsel's conduct therefore did not prejudice respondent.

Judge Loken also found error in the majority's refusal to permit the State an opportunity to conduct another sentencing proceeding. As an initial matter, Judge Loken disagreed with the majority's premise that the sentencing jury, to which two aggravating circumstances were submitted, would have returned a verdict of life imprisonment if the issue of pecuniary gain had been withheld. Pet. App. A18. Beyond that, he noted that, by forbidding Arkansas from seeking the death penalty at a resentencing proceeding, the court of appeals "mandat[ed] a procedure in the name of *Collins*, an overruled case, that neither *Collins* nor the Constitution ever required." *Id.* at A19 (emphasis in original). Judge Loken reasoned that, "because *Lowenfield* is now the law, Arkansas must be permitted to instruct the jury at [respondent's] resentencing that pecuniary gain is a potential aggravating circumstance." *Ibid.* He concluded that "the nature of the federal habeas corpus remedy compels this result, for it is surely beyond our habeas corpus powers to prohibit the state from conducting the resentencing proceeding in a manner wholly consistent with the Constitution." *Id.* at A20.

SUMMARY OF ARGUMENT

I. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed inadequately and that the defective representation affected the outcome of the trial. But it is not enough that the outcome would have been different; counsel's error also must have denied the defendant a right to which he is entitled.

The court of appeals found that respondent's counsel performed inadequately when he failed to raise

an objection to the use of pecuniary gain as an aggravating circumstance at sentencing when pecuniary gain was established in the course of proving the underlying offense. The court also found that counsel's failure to raise that issue affected the outcome of the sentencing proceeding, since at the time of respondent's trial, an Eighth Circuit decision held that such "double counting" was impermissible. In the court's view, that was enough to justify relief in this habeas corpus action. That conclusion was erroneous for two reasons.

First, more recent decisions from this Court and from the Eighth Circuit have made it clear that "double counting" is permissible; that is, a State may treat as an aggravating circumstance a factor that is also an element of the underlying offense. Therefore, it is now clear that respondent was not entitled to have the trial court instruct the jury to disregard pecuniary gain as a potential aggravating circumstance. Because counsel's failure to raise the *Collins* issue at trial did not deprive respondent of any right to which he was entitled, he has failed to establish the prejudice that is an essential element of an ineffective assistance claim.

Second, respondent has failed to establish the most fundamental requirement of habeas corpus relief: he has not shown that he is currently being held in violation of the Constitution. Instead, the most that he has shown is that his sentence was imposed at a time when the Eighth Circuit believed, incorrectly as it turns out, that sentencing proceedings such as his were constitutionally flawed. If respondent had challenged his sentencing proceeding on direct appeal and the issue had reached this Court, he would not have been entitled to relief on the ground that at the time of his trial the Eighth Circuit believed that

the Arkansas sentencing scheme was invalid. He should not be entitled to *greater* relief on habeas corpus after having failed to raise the issue at trial or on appeal and having instead raised it indirectly through a claim of ineffective assistance of counsel on collateral attack.

II. Even if respondent is entitled to habeas corpus relief, he is not entitled to be free from a resentencing proceeding at which the State may seek the death penalty through application of a constitutionally valid sentencing scheme. When a federal habeas court grants relief from a state conviction or sentence, it ordinarily permits the State to cure the constitutional error by conducting another proceeding that accords with constitutional standards. In this case, because the Constitution authorizes the State to use pecuniary gain as an aggravating circumstance, there is no reason to bar the State from conducting a new sentencing hearing at which it will be entitled to show, as an aggravating circumstance, that respondent committed the robbery-murder for pecuniary gain.

ARGUMENT

I. RESPONDENT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE HIS ATTORNEY'S ERROR DID NOT PREJUDICE HIS RIGHT TO A FAIR SENTENCING PROCEEDING

The court of appeals held that respondent's counsel should have objected to the use of pecuniary gain as an aggravating circumstance in his sentencing proceeding. If counsel had done so, according to the court of appeals, the state court probably would have followed the Eighth Circuit's then-applicable decision in *Collins v. Lockhart*, 754 F.2d 258, cert. denied, 474 U.S. 1013 (1985), and would have ruled in his

favor on that point. Absent that aggravating circumstance, the court of appeals determined, the result of the sentencing proceeding would have been different. Because counsel's error affected the outcome of the case, the court of appeals concluded that respondent was prejudiced within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984).

There is a basic flaw in the court of appeals' reasoning. In light of this Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), it is now clear that it was not error for the state court to permit the jury to consider pecuniary gain as an aggravating circumstance for sentencing purposes. Counsel's omission therefore did not deprive respondent of any right to which he was entitled; at most, counsel's error deprived respondent of the chance to have the state court make an error in his favor. And the loss of a chance for a constitutional windfall cannot support a finding of ineffective assistance of counsel.

A. A Defendant Is Not Denied The Effective Assistance Of Counsel If His Lawyer Fails To Present A Claim That Is Ultimately Determined To Lack Merit

The court of appeals' analysis reflects a misunderstanding of the nature and purpose of the Sixth Amendment right to counsel. The Sixth Amendment guarantee of the right to the assistance of counsel at a criminal trial is designed "to assure fairness in the adversary criminal process." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Thus, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984).

Counsel's assistance is "the means through which the other rights of the person on trial are secured." *United States v. Cronic*, 466 U.S. at 653; see also *Maine v. Moulton*, 474 U.S. 159, 168-170 (1985).

"The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Fairness of the proceedings and reliability of the verdict are central to the right. "Absent some effect of [counsel's] challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658. Thus, it is not enough for a defendant to show that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The defendant must also demonstrate that counsel's conduct deprived him of a fundamentally fair trial or sentencing, or of a specific constitutional right designed to guarantee a fair trial or sentencing.

It follows that, even assuming respondent's lawyer provided inadequate representation when he failed to raise a *Collins* objection at trial, and even assuming respondent's sentence would have been different if the objection had been made,² respondent neverthe-

² It is by no means clear that, even if respondent had raised an objection to the use of pecuniary gain as an aggravating circumstance, the Arkansas courts would have agreed with the Eighth Circuit that the sentencing proceeding was therefore invalid. State courts are, of course, obligated to follow the Constitution, but they are not obligated to follow the decisions of lower federal courts in determining what the Constitution requires. See *Steffel v. Thompson*, 415 U.S. 452, 482

less suffered no violation of his Sixth Amendment rights. That is because counsel's asserted error did not deprive respondent of a fundamentally fair sentencing or of a constitutional right designed to ensure a fair sentencing. More than two years before the district court granted respondent's petition for habeas relief, this Court held in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), that the Eighth Amendment's prohibition against cruel and unusual punishment does not prohibit a jury from imposing the death penalty on the basis of an aggravating circumstance that duplicates an element of the capital offense. Thus, under the law prevailing at the time respondent's habeas corpus petition was pending, the penalty phase of respondent's trial was valid under the Eighth Amendment.

That analysis finds support in the opinions in *Nix v. Whiteside*, 475 U.S. 157 (1986), and *Kimmelman v. Morrison*, 477 U.S. 365 (1986). In *Nix*, this Court considered whether defense counsel's assistance was ineffective because counsel coerced the defendant to tell the truth by threatening to advise the court if his client testified falsely. The Court paraphrased the

n.3 (1974) (Rehnquist, J., concurring); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-1076 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971); *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 179 (Cal. 1981); *State v. Coleman*, 214 A.2d 393, 403-405 (N.J. 1965); *People v. Kan*, 574 N.E.2d 1042, 1045 (N.Y. 1991); 1B J. Moore, *Moore's Federal Practice* ¶ 402[1], at 23 (1992). The Arkansas Supreme Court therefore might well have disagreed with the Eighth Circuit on the validity of the Arkansas sentencing scheme, a judgment that would have been vindicated by later developments in this Court and in the Eighth Circuit.

Strickland prejudice requirement: "To show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to 'undermine confidence in the outcome' of the trial." 475 U.S. at 165 (quoting *Strickland*, 466 U.S. at 694). The Court stated that, "as a matter of law," counsel's conduct could not "establish the prejudice required for relief under the second strand of the *Strickland* inquiry." The Court explained that "the 'benchmark' of an ineffective-assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'" 475 U.S. at 175 (quoting *Strickland*, 466 U.S. at 695). Even if Whiteside's lawyer effectively compelled him to abandon his intention to give perjured testimony in his own defense, the Court noted, Whiteside "has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury. Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced." 475 U.S. at 175-176.

Justice Blackmun, in a concurring opinion for the four justices who did not join the majority opinion, agreed that no prejudice had been demonstrated under *Strickland*. By asserting that he would have been acquitted if he had been able to testify falsely, Whiteside "claims a right the law simply does not recognize," Justice Blackmun explained. "Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice." 475 U.S. at 186-187.

Like Whiteside's claim, respondent's claim that his lawyer should have objected to the use of pecuniary gain as an aggravating circumstance is an assertion of "a right the law simply does not recognize." The Eighth Amendment confers no right on a defendant to prevent the jury from imposing the death penalty based on a factor that was also an element of the underlying offense. Since the procedures employed in the sentencing phase of respondent's trial were fully consistent with the Constitution, respondent was not entitled to have his sentence invalidated on collateral attack.

The opinion of the concurring justices in *Kimmelman v. Morrison*, *supra*, reiterates the same theme. In *Kimmelman*, the Court held that a claim that defense counsel was constitutionally ineffective in failing competently to litigate a Fourth Amendment issue could be raised on federal habeas corpus despite the limitation of *Stone v. Powell*, 428 U.S. 465, 482-496 (1976), on the use of the exclusionary rule in habeas corpus proceedings. The Court remanded the case because the record was "incomplete with respect to prejudice" under *Strickland*. 477 U.S. at 390. In an opinion concurring in the judgment, Justice Powell, joined by Chief Justice Burger and then-Justice Rehnquist, emphasized that the majority's resolution of the case had left unresolved the *Strickland* prejudice issue, and strongly suggested that prejudice within the meaning of *Strickland* could never result from counsel's failure to obtain the suppression of reliable evidence. Justice Powell wrote, 477 U.S. at 396, that "the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict." Therefore, "the harm suffered by respondent in this case is not the denial of a fair and reliable

adjudication of his guilt, but rather the absence of a windfall." As long as the fundamental fairness of the trial is not affected, Justice Powell noted, the harm suffered by the defendant "does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment." *Ibid.* Rather, "it would shake that right loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall." 477 U.S. at 397.

From these articulations it is plain that, to show "prejudice," as that term is used in *Strickland*, respondent was required to demonstrate, at a minimum, that his counsel's conduct deprived him of a fundamentally fair sentencing proceeding. Because it is now clear that respondent's sentencing proceeding was fair and constitutionally valid, respondent cannot make that showing. As Judge Loken concluded in dissent below, the court of appeals' decision granted respondent a windfall that *Strickland* does not require. Pet. App. A17.

The implications of respondent's claim are striking. If respondent is entitled to relief because his attorney failed to raise a claim that might have prevailed, even though it lacked merit, relief would also have to be granted to a prisoner whose lawyer failed to make a frivolous suppression motion, if the defendant could show that the judge assigned to his case had granted such motions in other cases. Likewise, an attorney might be regarded as constitutionally ineffective if he failed to pursue improper (but effective) trial tactics, as long as the judge before whom the case was being tried would not be likely to sustain objections to such tactics. If effect on the outcome is the only test, then there is no end to the meritless, improper, and even

unethical steps that a defense lawyer would be constitutionally obligated to pursue. This Court has never endorsed such an extravagant Sixth Amendment doctrine. It should not do so now.

B. Federal Habeas Corpus Relief Is Not Available If The Prisoner Is Not Being Held In Violation Of The Requirements Of The Constitution As They Are Currently Understood

In addition to misapplying *Strickland*, the court of appeals misinterpreted the scope of federal habeas corpus relief. The habeas corpus statute, 28 U.S.C. 2254(a), provides that a writ of habeas corpus may issue to an applicant "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." By its terms, the statute refers to custody that violates the Constitution at the present, *i.e.*, custody that is unlawful as of the time the writ is to be granted. If it is clear that the procedures employed in obtaining the defendant's conviction and sentence were lawful, it does not matter that, under the law prevailing at the time of his trial and sentencing, the defendant might have been able to obtain relief. Thus, in the case of a claim of ineffective assistance of counsel, a defendant should not be entitled to release if he does not have a presently valid claim for relief.³

³ A presently valid constitutional claim is only one of the prerequisites for obtaining relief on habeas corpus. This Court's recent habeas corpus decisions make it clear that a prisoner normally is not entitled to habeas relief unless his claim would also have been valid at the time of his trial or when his conviction became final. See *Teague v. Lane*, 489 U.S. 288, 308 (1989) (plurality opinion); *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989); *Butler v. McKellar*, 494 U.S. 407,

In light of this analysis, the lower courts' focus on the state of the law at the time of respondent's trial is misplaced. See Pet. App. A5-A12, A27-A28. Contrary to the court of appeals' suggestion, it should not

413-414 (1990); *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Sawyer v. Smith*, 110 S. Ct. 2822, 2830 (1990) ("[f]ederal habeas corpus serves to ensure that state convictions comport with the federal law that was established at the time the petitioner's conviction became final"). That separate limitation on the availability of habeas corpus relief is based on considerations of finality and proper respect for state court rulings on constitutional questions. Of course, the fact that it is ordinarily necessary to show that the claim was valid when the case was pending on direct review does not mean that all a habeas petitioner needs to show is that his claim would have been upheld under the standards prevailing at that time. If it has since become clear that the claim is not valid, the prisoner has failed to satisfy the first requirement for habeas relief—to show that he is currently being held in violation of the Constitution. Nor is there any force to the argument, see *Butler v. McKellar*, 494 U.S. at 422 n.4 (Brennan, J., dissenting), that it is somehow unfair to deny relief to a defendant who relies on a precedent that is no longer good law. The two prerequisites of habeas relief—the present validity of the prisoner's claim and the validity of the claim at the time of the trial—serve different purposes in habeas corpus law. The first is necessary to determine, as a threshold matter, whether anything that happened at the prisoner's trial raises constitutional concerns. The second is necessary to determine whether, once such concerns have been identified, considerations of comity and finality dictate that collateral relief should nonetheless be denied. If, under the current (and presumably the best) understanding of constitutional principles, there was no flaw in the trial, there is no reason even to reach the second question—whether the trial was conducted in accordance with constitutional standards applicable at the time the prisoner was tried. The fact that the prisoner must satisfy the second prerequisite does not somehow make it unfair to require him to satisfy the first.

matter to the resolution of this case whether the trial court would have, or should have, followed the rule in *Collins* if that decision had been brought to the court's attention. Likewise, it should not matter whether *Lowenfield* is viewed as having changed the law or merely as having applied prior legal principles in a somewhat different setting. All that matters is whether counsel's error resulted in the forfeiture of a right recognized at the time of the habeas proceeding. It is clear that under *Lowenfield*, which was decided while respondent's petition for habeas review was before the federal district court, counsel's conduct did not result in respondent's being sentenced in violation of the Eighth Amendment. Thus, the writ of habeas corpus should not have been granted.

To grant relief in a case such as this would invert the proper relationship between direct and collateral review. If respondent had objected to his sentencing proceeding and the state courts had upheld the Arkansas sentencing scheme, either in anticipation of *Lowenfield* or because *Lowenfield* had been decided while the case was on appeal, respondent would not have been able to argue in this Court that his sentence should be overturned because at the time of his trial the Eighth Circuit supported his position. Yet respondent now argues that his collateral attack should succeed where a direct appeal would have failed. His argument, reduced to its core, is that he should prevail because the Eighth Circuit agreed with his position at the time of his trial. That argument provides no justification for granting collateral relief.

II. EVEN IF THE DISTRICT COURT WAS CORRECT TO GRANT THE WRIT, THE STATE IS ENTITLED TO CONDUCT A NEW SENTENCING HEARING

Although the court of appeals upheld the district court's grant of respondent's habeas petition, it reversed the portion of the district court's order allowing the State to conduct a new sentencing proceeding. The court of appeals directed the district court to modify its order "to reduce unconditionally [respondent's] sentence to life imprisonment without parole." The court explained that to resentence respondent under current law "would perpetuate the prejudice caused by the original sixth amendment violation." Pet. App. A14.

This is clear error. Following a grant of habeas relief, it is ordinarily contemplated that the State may attempt to correct the defects identified by the habeas court by applying currently valid law. Thus, a State is permitted to retry or resentence a defendant under contemporary constitutional standards unless the original defect goes to the State's very ability to charge or try the defendant. See, e.g., *Parker v. Dugger*, 111 S. Ct. 731, 740 (1991) (reversing and remanding to the district court for an order directing state court to "initiate appropriate proceedings * * * so that [the defendant's] death sentence may be reconsidered" in light of the Court's ruling); *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (reversing and remanding with instructions to grant a writ of habeas corpus unless the State resentences the defendant in accordance with its decision).⁴ Accordingly, Arkansas would ordinarily be allowed to resentence a defendant, such as respondent, who has received ineffective assistance of counsel at the sentencing phase, as long as

the procedures employed at resentencing are constitutionally valid.

Under current law, it would be entirely proper for the jury to consider pecuniary gain as an aggravating circumstance in deciding whether to sentence respondent to death. Respondent's attorney would therefore no longer have any ground for objecting to the submission of that factor to the jury, and the jury could reimpose the death penalty on that basis. The court of appeals' decision to bar a resentencing proceeding has the bizarre effect of preventing the State from correcting its "errors," as identified by the federal court on habeas review. That remarkable result is premised on the theory that if the State simply follows the procedural rule that it applied in the first place, respondent will be no better off and thus will not have been afforded an adequate "remedy" for the violation of his Sixth Amendment rights. The fact that a remedial order permitting the State to resentence respondent does not require any change in the original procedure does not show that such an order would fail to remedy respondent's "prejudice." Rather, it simply confirms that respondent suffered no prejudice in the first place.

⁴ This case raises no issue under the Ex Post Facto Clause, see *Dobbert v. Florida*, 432 U.S. 282 (1977). That Clause applies only to statutes, not to rulings of courts addressing the scope of constitutional rights. Under Arkansas sentencing procedures, pecuniary gain was a permissible aggravating circumstance at the time respondent committed his offense, and it is still a permissible aggravating circumstance today. The fact that for a period following respondent's crime the Eighth Circuit took the view that pecuniary gain could not be used as an aggravating circumstance in a case such as respondent's does not give rise to Ex Post Facto concerns.

This Court's decision in *United States v. Morrison*, *supra*, is instructive here. In that case, the court of appeals found that the government had engaged in improper conduct designed to deprive the defendant of her right to counsel. This Court reversed, holding that absent some injury of a constitutional dimension, it was improper for the court of appeals to order relief. As this Court explained, "[t]here is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted. The Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against respondent Morrison, much less the drastic relief granted by the Court of Appeals." 449 U.S. at 366-367. Because respondent in this case, like the defendant in *Morrison*, suffered no cognizable prejudice, he should not be entitled to any relief, much less the extraordinary relief of forbidding the State to resentence him.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted.

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